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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-685

NEVILLE M. TUCKER,
Petitioner,

vs.

KENTUCKY BAR ASSOCIATION,
Respondent.

PETITIONER'S REPLY BRIEF

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I.
THE POSITION OF RESPONDENT WITH RESPECT TO THE ISSUE OF WHETHER OR NOT PETITIONER WAS GIVEN FAIR NOTICE OF THE TYPE OF DISCIPLINE TO WHICH HE MIGHT BE SUBJECT IS DIRECTLY AT ODDS WITH ITS POSITION IN THE COURT BELOW.

Respondent in its brief in opposition to the Petition for Certiorari (hereinafter "Brief") takes a position directly contrary to the position it took in the court below. This conflict points out with the starkest clarity how petitioner was misled and deprived of fair notice in the court below with

respect to the sanction which the State was seeking to impose upon him: In the court below, the respondent itself viewed the matter exactly as he did.

Respondent now argues that:

> "Disbarment is the only responsible action the Kentucky Court of Appeals could take to protect the public from the gross, dishonest misconduct of petitioner." (Brief, p. 24)

And it says that:

> "The action of the Kentucky Court of Appeals in ordering disbarment should not have surprised petitioner..." (Id. at 18)

Petitioner submits that "[t]he action of the Kentucky Court of Appeals in ordering disbarment" certainly should have surprised him, as it most certainly did, because it surprised respondent, as well.

In its brief in the Kentucky Court of Appeals, respondent argued that the alleged "immorality raised by petitioner's conduct and his breach of integrity and lack of probity under Kentucky law" were such as to merit a public reprimand. Respondent most certainly did not argue, as it does now in this Court, that "[d]isbarment is the only responsible action the Kentucky Court of Appeals could take." Quite to the contrary, respondent's brief did not even intimate that disbarment might be appropriate.

In response to the Rule to Show Cause with which

he was served, petitioner filed a brief in the court below arguing that the conduct with which he was charged did not merit a public reprimand, as sought by respondent, but that a private reprimand would be sufficient. See Petition, p. 10. Respondent, in its answering brief, argued that the conduct was such as to require a public reprimand.

Petitioner did not argue, as is now suggested by respondent in this Court, "why he should not be disciplined, up to disbarment" (Brief, p. 18), and neither did respondent. 1/

Quite clearly, the argument below was over whether a private reprimand or a public reprimand should be administed to respondent, with neither party so much as touching on the issue of disbarment.

Thus, quite contrary to the position of respondent in this Court, it would seem quite clear that all parties were "surprised" when the court below handed down its opinion permanently disbarring the petitioner from the practice of law. 2/

In view of its position below, it ill behooves respondent to argue in this Court that "the ... Rule to Show Cause stated that petitioner should respond

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1/ Thus, petitioner's failure to file a reply brief below, contrary to what respondent suggests (Brief, p. 18), is of absolutely no significance.

2/ In In re Waxman, 160 S.W. 2d 587 (Ky., 1942), cited by respondent, the attorney was clearly on notice that disbarment was sought.

to the degrees of possible discipline from public reprimand to disbarment..." (Brief, p. 17), when respondent, per its brief below, interpreted the Rule to Show Cause precisely as petitioner did, and an examination of the Rule to Show Cause reveals quite clearly that it did not state what respondent now says that it "stated." See Petition, pp. 4a-5a.

Beyond this, the argument of respondent with respect to the adequacy of the notice in fact given by the Show Cause Rule must fail for the following additional reasons:

1. Respondent, while expounding on the due process merits of the provisions of Rule 3 of the Kentucky Court of Appeals (e.g., Brief, pp. 14-15), completely fails to respond to the argument of the petitioner as to why the language of the Rule to Show Cause issued in this case materially differed from the language specified for such a Show Cause Rule by Rule 3 of the Kentucky Court of Appeals, to wit, RCA 3.410. See Petition, p. 14.

2. RCA 3.380, which respondent characterizes as "clear" (Brief, pp. 16-17) with respect to putting the petitioner on notice that he might be disbarred, is, we submit, anything but clear. See Petition, p. 14. The additional paper served upon petitioner together with the Show Cause Rule (Brief, pp. la-2a), which paper again informed petitioner, as he was informed by the Show Cause Rule itself of the "recommendation by the Board," merely strengthens our argument. 3/

3/ Nor is the confusion mitigated by the provision of RCA 3.370 which states that "any recommendation [by the Board] to the Court that disciplinary

(Footnote continued on next page.)

3. Contrary to what respondent states at p. 21 of its Brief, to wit, that "The Court only makes a final determination on the matter after it has received a Response to a Rule to Show Cause and any Petition for Rehearing has been fully considered," the Rule to Show Cause expressly states that it will be "made absolute" upon "failure to answer." Petition, p. 5a. 4/

Certainly, this means that "upon failure to answer," the finding and recommendation of the Board of Governors would be confirmed 5/--in this case, that petitioner would receive a public reprimand.

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action be taken shall be advisory," as respondent would not suggest. Brief, p. 17. The provision simply and clearly means that if the Board makes a recommendation to the court that certain disciplinary action be taken, the court may or may not elect to take such action--not that the court could without notice take action beyond that recommended --and it was so construed by respondent in the court below. Respondent's brief below argued 1) that disciplinary action was appropriate to the case; and 2) that the type of discipline to be administered was a public reprimand.

4/ The Show Cause Rule states, in pertinent part, "... and warn him that upon his failure to answer, the rule herein shall be made absolute..."

5/ See, In re Waxman, supra, Ky., 160 S.W. 2d 587, where this is precisely what happened.

And clearly, petitioner had no notice whatsoever that by contesting the propriety of the public reprimand which the Rule to Show Cause told him he would receive if he failed to respond, that he would be subjecting himself to the possibility of disbarment. This was especially so where respondent in its briefs and other papers never once ever intimated that a penalty more severe than a public reprimand might be appropriate--much less that disbarment might be appropriate.

That respondent has been compelled to take a different position in this Court establishes beyond a shadow of a doubt the lack of Constitutionally fair notice in the court below, and the necessity for review by this Court.

II.

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER PETITIONER HAD A CONSTITUTIONAL RIGHT TO BE HEARD ORALLY ON THE ISSUE OF DISBARMENT.

Respondent argues that petitioner could have derived "no benefit" from an opportunity to be heard orally in the highest court of Kentucky because that court "had determined correctly that a lawyer's conversion of a client's funds warrants disbarment." Brief, p. 20.

Notwithstanding that, as we pointed out above, respondent itself took a position below contrary to what it now characterizes as "correct," i.e., that disbarment was not warranted, the very argument

now made points out exactly why oral argument was essential in this case: Petitioner had never been charged with "conversion of a client's funds;" no finding of conversion had been made by any administrative fact-finding body, as it had been in In re Waxman, supra, cited by the court below in support of its decision; 6/ and petitioner had never been informed that his conduct "warrant[ed] disbarment." Even though petitioner had admitted the return of the checks for insufficient funds, the Court of Appeals had still to determine, under its broad construction of its powers in this case, a) the inferences to be drawn from the admitted facts; 7/ b) whether the conduct amounted to unprofessional conduct; and c) the discipline, if any, to be

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6/ Petition, p. 3a. Respondent, while first arguing in this Court that conversion is "the ONLY inference that can be drawn" from the fact that the checks were returned for insufficient funds (Brief, p. 12) (emphasis in original), later retreats from this position and argues first that the inference was "clearly warranted" (id. at 22), and then that the drawing of it was not even essential to sustain the extreme penalty of disbarment (id. at 23), as it most certainly was to the court below, as its opinion makes clear. See Petition, p. 3a.

By stating that "[e]ven without drawing an inference of conversion, it is clear the funds were not intact..." (Brief, p. 23), respondent makes clear for all concerned that conversion is not the only inference which can be drawn from the return of checks for insufficient funds.

7/ It was indeed quite clear that though a check

(Footnote continued on next page.)

imposed. Had petitioner been given an opportunnty to appear before the court and argue orally, at least he would have had some notice, by colloquy from the bench, that the court, as opposed to the adversary party, considered the matter tantamount to one of conversion and warranting of disbarment, and some opportunity to respond thereto.

Under their construction of Kentucky law, the Justices of the Kentucky Court of Appeals stood in the same position vis-a-vis petitioner as the judge in Herring v. New York, ___ U.S. ___, 45 L. ed. 2d 593 (1975), stood vis-a-vis the defendant there: They had sole and complete power to determine the facts, the law, and the penalty to be imposed. The petitioner submits that disbarment is so severe a penalty as regards a lawyer's career that due process requires a right to be heard orally before the body with the power to impose it, especially where that body is the State's highest court. While

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was returned for insufficient funds on August 23, 1973, the bank statement showed that petitioner's account had been credited with adequate funds on that day to meet the check. The problem apparently was caused by the bank's policy of returning a check in the morning hours even though a deposit was made later in the day and before closing time.

None of these refinements could be presented to the court under the procedure whereby petitioner had no notice of intended disbarment or an opportunity to argue orally the facts and reasonable inferences to be drawn.

Herring does not decide the issue, 8/ "the adversary system's commitment to argument," __ U.S. __, 45 L. ed. 2d at 599, reaffirmed in that case, should likewise be reaffirmed where the litigant is an attorney facing the most severe penalty possible with respect to his career, and where this Court has already held the proceeding at issue to be "quasi-criminal," In re Ruffalo, 390 U.S. 544, 550-51 (1968). Certainly the issue presents a substantial Constitutional question. 9/

8/ __ U.S. at __, n. 13; 45 L.ed. 2d at 601, n. 13.

9/ We agree with respondent that this case is in some respects different from the other two Kentucky disbarment cases now pending before this Court. Brief, p. 15. In those cases, the attorneys had clear notice of the type of discipline to which they might be subject. Thus, this case merits review even more strongly.

Beyond that, petitioner has examined the reply brief in Collis v. Kentucky Bar Association, No. 75-471, and incorporates Points I and II thereof by reference, because the underlying issues discussed there are in major respects the same as in this case. Thus, in Point I of the Collis reply brief, an effective answer is given to the argument of respondent, here as in Collis, that somehow Constitutional issues disappear because the lower court acted "through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky" (respondent's Tucker brief, p. 10; Collis brief, p. 9). Point II of the Collis reply effectively deals with the special impact of the power of the Board of Governors to terminate a proceeding and the lack of oral argument before the court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated:
December 22, 1975.

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